IN THE

Supreme Court of the United States

October Term, 1969

No. 982

O. FRANK THORNTON, Secretary of State of South Carolina, et al., Appellants,

versus

CECIL D. CLAY, et al., Appellees.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

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Pursuant to Rule 16(1)(b) of the Revised Rules of the Supreme Court of the United States, O. Frank Thornton, Secretary of State of South Carolina, an appellee erroneously designated in the Jurisdictional Statement as an appellant, moves the Court to dismiss the appeal herein on the ground that it is manifest that a substantial federal question is not presented.

QUESTION PRESENTED

Whether or not the failure of the Supreme Court of South Carolina to interpret Article 8, Section 2 of the Constitution of South Carolina so as to permit the application of the presumption that electors who do not vote in an election are to be presumed to have acquiesced in the ex-

pressed will of those who do would deny the majority of those electors voting at an incorporation election the equal protection of the laws.

STATEMENT

On April 10, 1969, there was filed with the Secretary of State of South Carolina a petition which indicated that more than one hundred citizens of Charleston County desired that an area containing more than five thousand inhabitants and commonly known as North Charleston be incorporated as a city. The petition, which was signed by at least one hundred freehold voters, suggested that the proposed municipality be named "North Charleston, South Carolina" and described the proposed corporate limits as that area which now constitutes the North Charleston Consolidated Public Service District. It alleged that 94,400 inhabitants resided in the proposed city.

Thereafter, the Secretary of State, on May 1, 1969, issued a commission to seven citizens of the proposed municipality which authorized them to provide for the election required by Section 47-352 of the South Carolina Code of Laws. That election was held on June 17, 1969; and, at that time, 16,900 electors were eligible to vote therein. The commissioners certified the election returns to the Secretary of State on June 18, 1969, and the returns revealed that only 7,315 electors participated in the incorporation election. Of that number, 4,572 favored incorporation while 2,743 opposed it. The name "North Charleston" received the approval of the majority of those voting in the election; and Robert W. Turner, an appellant herein, was elected mayor of the proposed municipality. Pete B. Adams, Ben T. Austin, III, W. Earl Beard, Sr., W. W. Taylor, Jr., Eugene R. Ott, and John E. Moon, who are also appellants herein, were elected aldermen.

In an effort to determine whether or not the incorporation of the proposed City of North Charleston had been legally accomplished, six electors, the appellees, who reside within the proposed city, upon a verified petition, asked leave of the Supreme Court of South Carolina to proceed with their cause in its original jurisdiction. Such was granted on June 19, 1969; and, pending the determination of the issue which the petition raised, the Supreme Court enjoined the Secretary of State from issuing a certificate of incorporation and enjoined those who were designated as mayor and aldermen of the proposed city from attempting to assume their respective offices.

Before the Supreme Court of South Carolina, the appellees, as well as the Secretary of State, who, it should be noted, has erroneously been designated as an appellant in the appeal to this Court, contended that the incorporation of the proposed municipality had not been achieved because a majority of all electors residing in the area sought to be incorporated did not really consent to the proposed incorporation as required by Article 8, Section 2 of the South Carolina Constitution[1] because a majority of them did not actually vote in favor thereof and that the statutory provision, Section 47-353 of the Code of Laws of South Carolina,[2] which would allow the incorporation of an area upon the actual consent of less than a majority of those electors residing in an area proposed to be incorporated was, to that extent, unconstitutional. The appellants, on the other hand, maintained that a majority of all electors who resided with-

[1] "No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law." S. C. CONST. Art. 8, § 2 (1895).

[2] "If a majority of those voting in (the incorporation) election shall vote in favor of such proposed territory being incorporated, then the Secretary of State shall issue a certificate of incorporation of the proposed city . . .". CODE OF LAWS OF SOUTH CAROLINA § 47-353 (1962).

in the proposed City of North Charleston had consented to the incorporation of that area because all qualified voters that did not vote in that election were to be presumed to have assented to the expressed will of those who did. Further, they argued, any interpretation of the state constitutional provision that would prohibit the application of that presumption would deny the equal protection of the laws to those voting in favor of incorporation and constituting the majority on that election because their votes would, as a consequence, be rendered less effectual.

The contentions of the appellants were rejected and those of the appellees and the Secretary of State adopted when the Supreme Court, on September 3, 1969, made its temporary restraining order permanent. This appeal followed.

REASONS FOR GRANTING THE MOTION TO DISMISS

The appellants maintain that where an election is held in South Carolina to determine whether or not a proposed city is to be incorporated and at that election a majority of the voters, but not a majority of all electors of the area proposed to be incorporated, vote in favor of incorporation, the failure of Article 8, Section 2 of the Constitution of South Carolina, as interpreted and applied by the South Carolina Supreme Court, to permit the application of the presumption that electors who decline to vote in an election are presumed to acquiesce in the decision made by the majority of those who do results in the denial to that majority of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that the failure to employ that presumption renders their votes less effectual.

To sustain an objection that a statute or other law denies a party the equal protection of the laws, it must be

shown that the statute or other law treats the party differently from others who are in the same situation as he. *Ohio v. Dollison,* 194 U. S. 445, 24 S. Ct. 703, 48 L. ed. 1602.

> "And whenever the law operates alike on all persons . . . similarly situated, equal protection cannot be said to be denied." *Walston v. Nevin,* 128 U. S. 578, at 582, 9 S. Ct. 192, 32 L. ed. 544.

The record in this case does not set forth any facts whatsoever that would indicate that the appellants have received treatment different from that which has been administered to others seeking the incorporation of a city or town in South Carolina. Before an area may be incorporated in this State, there first must be actually obtained the consent thereto of the majority of all electors residing and entitled to vote therein notwithstanding the area's location, size, or population and irrespective whether the means chosen by the General Assembly for manifestation of that consent is the petition or election method, or some other. The consent of merely a majority of those who vote in an incorporation election is not sufficient to satisfy the requirements of Article 8, Section 2 of the Constitution of South Carolina. Mayor-designate Turner and the other appellants are as bound by that constitutional requirement as any other similarly-situated elector in this State. No discrimination is practiced upon them.

With regard to the allegation that the failure to apply the aforementioned presumption rendered the appellants' votes in the North Charleston incorporation election and the votes of those who voted as they did less effectual, that assertion cannot be denied because to have applied it would have made their votes more effectual in that the presumption would have caused their votes to have been accorded a weight that would have been far greater than that of the minority who opposed incorporation. To have applied the

presumption in that instance would have meant that, while the 2,743 votes of those who opposed incorporation would have remained at that figure, the majority's 4,572 votes would have counted the same as 8,451 votes, the number needed to constitute a majority of all electors residing and entitled to vote in the proposed city. The application, then, of the presumption would have inflated the votes of those who favored incorporation; and the inflation of one's vote is as reprehensible constitutionally as the dilution of one's vote. No person, this Court has indicated, can be given "twice or ten times the voting power of another." *Reynolds v. Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506 at 525.

The refusal to employ the presumption in this case would not mean, as Turner and the others contend, that all abstaining electors would be classified as having voted against incorporation. More properly, the failure to apply the presumption would mean that all abstaining electors would be regarded as having done what they in fact did, *i. e.,* absented themselves from the election and assumed no position with respect to the question involved therein. Beyond that, it is no less unreasonable to classify abstaining electors as having voted against incorporation than it is to classify them as having voted in favor thereof. A requirement that an election be carried by a majority of all persons lawfully entitled to vote thereat may be an uncommon one, but it is not unheard of; see: *Clayton v. Hill City,* 111 Kan. 595, 207 P. 770; *Re East Bay Muncipal Utility District Water Bonds,* 196 Cal. 725, 239 P. 38; Annot., 131 A. L. R. 1383; and simply because a requirement is unusual does not make it unconstitutional.

As the opinion of the Supreme Court of South Carolina recognizes, *Clay v. Thornton,* —— S. C. ——, 169 S. E. (2d) 617 at 619; Jurisdictional Statement, Appendix A at

16, the election method is not the only means contemplated by Article 8, Section 2 which the electors of a district in this State may be authorized by the legislature to employ in an attempt at establishing a municipal corporation. The General Assembly of South Carolina, if it wishes could adopt the petition method, either as an alternative or as the exclusive means by which the consent of the majority of all the qualified electors in an area sought to be incorporated is to be ascertained. Irrespective which method is chosen or is employed, because of Article 8, Section 2, a majority of all electors in the area must actually consent to incorporation.

> "The meaning of the constitutional mandate does not vary according to the method adopted by the Legislature to implement it." *Id.*

Had the General Assembly provided the petition procedure as an alternative method for seeking the incorporation of an area and had that alternative method been used in the attempt to incorporate the proposed City of North Charleston, 8,451 electors would have actually had to have consented to the incorporation of that territory before it could have been organized into a new municipality. But, if the Equal Protection Clause requires, when the election method is employed, the application of the presumption under discussion, as the appellants contend that it does, theoretically, and admittedly an extremely hypothetical situation, had only one person voted in the incorporation election in favor thereof and had no other elector voted in opposition, that one vote would have been all that was needed to have brought about the creation of the proposed city. Thus, one man's vote would have carried the weight of 8,451; and that one man would have been able to have accomplished that which he could not have done by a petition. Surely, equal protection is not a tool that is to be used for the circumven-

tion of a reasonable state constitutional requirement governing the organization of a state's own political subdivisions.

Apparently, the appellants agree that in South Carolina the legislature could adopt the petition method as a means by which the consent of the majority of all electors to the incorporation of an area could be ascertained and that the consent of a majority of all electors to the incorporation of an area proposed to be incorporated must actually be obtained if that method is used. At least, they do not attack the holding of the Supreme Court in that regard. Although the appellants appear to concede that the election method is not the only procedure which the legislature could have adopted for the manifestation of the requisite consent, they contend, however, that where the election method is nevertheless designated by the legislature as a means of ascertaining the consent of the majority of all electors to the incorporation of a territory, that majority's actual consent is not required since, they argue, the Equal Protection Clause, in that event, allows the consent to be imaginary inasmuch as it necessitates the application of the presumption that those electors who do not vote in an election are deemed as acquiescing in the decision made by those who do. That contention, if upheld by this Court, could result in the election method being regarded by the Supreme Court of South Carolina as an unconstitutional means by which the consent of the majority of all electors of an area to its incorporation may be ascertained. The latter has interpreted Article 8, Section 2 as prohibiting the incorporation of a territory unless, by some authorized means, the majority of all electors residing therein really consent to incorporation; and any method which would allow the incorporation of an area without the consent of the majority of its electors having truly been acquired would violate that state constitutional provision. If, then,

the Equal Protection Clause required the application of the presumption desired by the appellants, the entire incorporation election was necessarily a nullity; and the judgment of the Supreme Court of South Carolina would, therefore, rest upon an adequate non-federal basis.

Somewhat misleading is the question which the appellants claim is involved in their appeal to this Court. See: Jurisdictional Statement at 4. The Supreme Court of South Carolina did not hold, as that question suggests, that Article 8, Section 2 of the South Carolina Constitution is to be interpreted as requiring that in every incorporation election in this State more than a majority of those voting in such an election must vote in favor of incorporation. Rather, the Supreme Court held, as has been mentioned, that when the issue as to whether or not a territory should be incorporated is to be determined by the election process instead of the petition or some other method, before incorporation can be achieved, Article 8, Section 2 requires that a majority of those who vote in an incorporation election in favor thereof also constitute a majority of all electors who reside and are entitled to vote in the district proposed to be incorporated; and a majority of those who vote in an incorporation election can, of course, also constitute a majority of all electors who reside and are entitled to vote in an area.

The appellants allege that the amount of votes required for the organization of a municipality in South Carolina is an amount which is unattainable. That allegation is not supported by the record herein and, moreover, is one with which the Secretary of State cannot agree. The number of persons who will vote in a given election, whether it is for the incorporation of a territory or for some other purpose, will depend upon many factors. Among them are the weather conditions on election day, the publicity given to the issues involved, and the importance of the contest. Perhaps it is a difficult job for incorporators to get a majority of an

area's electors to come to the polls and vote in favor of incorporation; however, it is not an impossible task.

Finally, a claim is made by the appellants that the decision from which they appeal is in direct conflict with recent decisions from other states. Cited are *Bogert, et al. v. Kinzer, et al.,* (Register No. 27864, 6th Judicial District of the State of Idaho, County of Bannock); *Lance v. Roane County Board of Education,* (Opinion No. 12809, W. Va.), *Westbrook, et al. v. Mihaly,* (SF 22706, California); *Adams v. Mihaly,* (SF 22707, California); *Larez, et al. v. Shannon, et al.,* (Opinion No. 16043, Superior Court of Sutter County, California); and *State v. State Canvassing Board,* 78 N. M. 682, 437 P. (2d) 143; Jurisdictional Statement at 9-11. Generally, those cases dealt with the constitutionality of constitutional and statutory provisions requiring a two-thirds majority vote for the approval of bond issues and the like. Here, the validity of such a requirement is not at issue; consequently, there is no conflict existing between the decision of the Supreme Court of South Carolina and those of other state courts.

CONCLUSION

It is respectfully submitted, therefore, that the appellants present no substantial federal question for the decision of this Court and that, accordingly, their appeal should be dismissed. Moreover, the Secretary of State joins in the Motion to Dismiss that is being submitted by those correctly designated as appellees.

Respectfully submitted,

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